IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

STATE OF OREGON,	)	
	)	
Plaintiff,	)	Washington County Circuit Court
	)	
v.	)	No. 16CR46339
	)	
BENJAMIN JAY BARBER,	)	CA A163786
	)	
Defendant.	)	***Volume 2 of 5***

TRANSCRIPT OF PROCEEDINGS ON APPEAL

BE IT REMEMBERED that the above-entitled Court and cause came on regularly for hearing before the Honorable Eric Butterfield, on Wednesday, the 28th day of September, 2016, at the Washington County Courthouse, Courtroom No. 108C, Hillsboro, Oregon.

APPEARANCES

Marie Atwood, Deputy District Attorney,
Appearing on behalf of the State;

Cameron Taylor, Attorney at Law,
Appearing on behalf of Defendant Barber.

ALSO PRESENT

Melanie Kebler, Attorney at Law.

KATIE BRADFORD, CSR 90-0148
Court Reporter
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Proceedings recorded by digital audio recording;
transcript provided by Certified Shorthand Reporter.

GENERAL INDEX

VOLUME 2

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(Volume 2, Wednesday, September 28, 2016, 9:02 a.m.)

P R O C E E D I N G S

(Whereupon, the following proceedings were held in open court:)

THE COURT: We are on the record in the State of Oregon versus Benjamin Barber, Case No. 16CR46339.

Mr. Barber is present. He is in custody with counsel, Cameron Taylor. Marie Atwood is here for the State of Oregon.

And so we're ready to proceed on the demurrer?

MR. TAYLOR: Judge, that's correct. Our understanding after leaving FRC is that today, we are going to discuss and argue the demurrer motion and then we're going to select a new trial date based on the State's reset that was granted at the FRC and with the obvious implication that my client will be released from custody today. That's his 60 days. I would --

THE COURT: Oh, is that right? I wasn't aware of any of this. So we're not trying this case today?

MS. ATWOOD: No, Judge.

THE COURT: If we get to that point?

MS. ATWOOD: Right.

THE COURT: Okay. All right. Very good.

MS. ATWOOD: The only other issue I'd like to bring up -- sorry for jumping in -- is that, as you may have seen in court, the victim's attorney -- counsel for the victim, filed, basically, like, an Amicus response to the defense demurrer.

It -- from what we've discussed briefly so far, it seems like the defendant would object to victim's counsel being able to discuss or argue their point of view as to the motion.

But the -- the more that I've thought about this, from the State's perspective, considering that the outcome of this motion could affect whether or not the case proceeds, I -- I -- I think, obviously, it qualifies as a critical stage hearing.

And I think that the victim's attorney should be able to speak on behalf of the victim as it relates to the demurrer motion.

THE COURT: Okay. Very good.

And I take it that's the individual standing behind you?

MS. KEBLER: Yes, Judge.

THE COURT: Good morning.

MS. KEBLER: Melanie Kebler, here for the victim in this case.

THE COURT: Good morning, Ms. --

MS. KEBLER: Good morning.

THE COURT: -- Kebler.

MR. TAYLOR: Judge, may I be heard on this matter?

THE COURT: Sure.

MR. TAYLOR: So, Judge, I became aware of this, I guess, two days ago when Ms. Kebler filed her memorandum. And I've reviewed all of the case law and the constitutional provisions on victims' rights and things like that.

I don't think there's any problem with Ms. Kebler filing the motion for the Court's consideration in a form of, you know, some sort of Amicus-type brief. However, I don't believe Ms. Kebler has any standing to argue in this matter before the Court.

This is a legal argument in the case of the State of Oregon versus Benjamin Barber and my client has due process rights to be prosecuted by only the State of Oregon, which is effectively what is happening here.

As far as the constitutional provisions

for victims' rights go, they say that the victim has the right to be heard at pretrial release and at sentencing. I don't believe that covers any of these sorts of situations arguing at demurrer.

And as far as the fact that Ms. Kebler is an attorney, obviously, she represents the victim. However, there would be no situation I can imagine in which the Court would have a victim arguing a motion, so I don't see any reason why the victim's representative should be granted any different or additional opportunities to do so.

THE COURT: Great. Thank you.

Did you want to be heard on that, Ms. Kebler?

MS. KEBLER: Yes, Judge.

THE COURT: I'll allow you to make argument on the --

MS. KEBLER: Your Honor, we --

THE COURT: -- on that.

MS. KEBLER: -- disagree with the State [sic]. This is critical stage. We believe that the victim does have a right to participate at this point in the -- in the case. But, you know, I'll leave it up to you, Judge.

You have my -- my memorandum and, quite

honestly, I think a lot of the arguments overlap with the State is going to argue anyway, so whatever you'd like to do, Judge. I'm here to be heard if you want me to elaborate on my memo. If not, that's okay with me, too.

THE COURT: All right. Thank you very much, Ms. Kebler.

(Pause in proceedings, 9:05 a.m. - 9:06 a.m.)

THE COURT: All right. So go ahead, Mr. Taylor. Let's hear your argument on the demurrer.

MR. TAYLOR: Thank you, Judge.

And I guess I'll -- Judge, I'll start with a question. Has the Court had a chance to review the demurrers or are we kind of starting from scratch?

THE COURT: I was assigned this case after I left work yesterday. I got here this morning around 8:30 and read very quickly through everything you all have filed.

MR. TAYLOR: All right. I'll just --

THE COURT: I'll leave you to interpret that however you will.

MR. TAYLOR: All right. So I guess I'm

going to start with a couple of sort of premises and then I'll get into where I think the action in this argument is.

Obviously, this is the so-called revenge porn statute that was adopted earlier this year. The idea is that it criminalizes the dissemination of an intimate image through an internet website.

And it has several additional elements involving consent of the person in the intimate image, the intent of the person who distributes it, as well as whether a sort of harm, humiliation or injury occurs.

So it's a statute that, yes, spent a lot of time being sort of debated and worked on. It's a statute that as been mirrored in many other states. I think 37, at this point, states in the last year or two have adopted these sort of things. So it is one of these types of crimes that has all of a sudden become a big thing in the world.

You know, it's part of the growing sphere of internet, social media, privacy and how people interact with each other and as all of those things that sort of exploded into the world, it creates problems, many of which are not socially desirable.

And, clearly, revenge porn is one of those. You know, the fundamental premises is that somebody is in a relationship with somebody.

They receive these intimate photographs as part of that relationship and then after something goes south or the relationship ends, the party holding the photographs as a manner of taking revenge, posts them to some form of internet website.

The big premise I want to start out with, Judge, is that, obviously, this is not laudable conduct. It is not praiseworthy or something we should encourage, but that isn't the question.

The question, when it comes to free speech in particular, is, is this speech? And if so, can the government prohibit it? And if they can, did they do it the right way?

And the history of the First Amendment and Oregon's free speech provisions are rife with examples of speech that the majority -- the vast majority of people would find reprehensible. But a lot of that is constitutionally protected.

You know, we're talking about things like hate speech, obscenity, blasphemy, you know, speech critical of government. The United States has gone through many permutations of -- of what the new

threat to society is, you know, every -- whether it's communists or blasphemy or obscenity.

We've been through all of these and we realize that the fundamental idea behind a lot of the free speech provisions in this country and in this State are that Americans and Oregonians are robustful [sic]. We don't criminalize speech because we are afraid of what it has to say.

We don't criminalize speech because people don't want to hear it. We criminalize speech when there is a separate and distinct harm that it causes. And those are the only instances in which we criminalize speech.

So I guess with that being said, I'm going to move into sort of the State analyzes and then the federal analysis. Free speech in Oregon, Oregon is widely known has having some of the broadest free speech protections.

The case that defines it is State v. Robertson. It's an old case, about 30 years old. There's been about 30 to 40 cases decided under that framework, but the basic framework is this: When a challenge of free speech is -- arises, the first step is you decide which category it falls into.

There's basically three categories and

I'm going to refer to my notes throughout this to make sure I'm getting the language right because this is a pretty language-dependent issue.

The first category are those statutes which, on their face, are written in terms directed at the substance of any opinion or any subject of communication.

Now, this is not -- the Supreme Court has never acknowledged that this is a content-based category in the sense that, you know, the way content-based and content-neutral are used in First Amendment federal litigation, but the basic idea is very similar.

These are statutes which are facially written to be directed at some content of speech. The second category, Judge, are statutes that prohibit expression used to accomplish forbidden results.

And so these are statutes that are written that may or do implicate speech as far as what they criminalize or prohibit, but are, in the end, based at some prohibited results.

The third category is those statutes which incidentally burden speech, but aren't facially directed at speech. I believe the parties are in

complete agreement that, obviously, the third category is not implicated here.

This statute, on its face, says, "We are regulating the dissemination of intimate images." So it's clearly facially directed at speech. I think that the action in this case, the big argument as far as the Oregon Constitution goes, is whether this falls into the first category or the second.

The reason that matters, if the speech falls -- or if the statute falls under the first category, then the statute is presumptively unconstitutional unless it falls within some recognized historical exception that was around at the time the Oregon free speech provisions were adopted.

And the Oregon Supreme Court has gone through a handful of those over the years as things like defamation and libel, forgery, verbal solicitation of crime, a lot of the sort of classic exempted categories that are also recognize by the federal First Amendment.

I don't think either party believes that there is any historical exemption that would cover revenge porn. And I can elaborate on that if necessary, but I think it's somewhat clear.

Obviously, this idea of disseminating photographs of another person that were consensually exchanged, I mean, nothing like that was even contemplated in the 1850s when the Oregon -- Oregon adopted its free speech provisions.

I've spent a lot of time researching it. I can find nothing that even approximately gets towards it, so I don't there' anything in there. So I think if we are in the first category, then the defense is correct and we basically win.

Conversely, if it's in the second category, the test is whether the statute is substantially overbroad. And I'm not going to directly concede, for the matter of making a record, that this statute is -- isn't overbroad.

But I put a lot of time and research and effort in thinking about it. And I basically don't have any argument that this statute is substantially overbroad because I think the legislative history is pretty clear that as far as overbreadth, the Legislature tried to make a pretty good stab at narrowing things down.

There are a number of savings clauses in the statute where they exempt, you know, matters that are of public concern, the Anthony Weiner type

things, that kind of stuff.

So I think if the Court decides that this falls into the second Robertson category, I think the State will win on the Oregon Constitutional argument. So that's kind of where all of the action is.

Now, what the actual dividing line between the first and second category is, is relatively difficult to tell. And the reason for that is because of the 30 or 40 cases that examine statutes and then toss them into either the first or second Robertson category, the Court uses a lot of kind of loose language.

And part of that comes because you got opinions coming from, you know, a three panel -- or a three-person panel in the Court of Appeals all the way up to an (indiscernible) Supreme Court opinion. And, obviously, they're going to use different language as they go around.

Having read all of those cases and then read them again looking for some sort of divining principle of what divides the first category from the second, I think something becomes clear.

Now, the State's argument as far as what the divide is, is that in first category, there's no

harm and in the second category there is this harm, this forbidden effect.

But that can't be true because, obviously, every statute that is also in the first category has a harm, a forbidden effect, associated with it. Some of the common examples of things that are in the first category are defamation, libel.

Obviously, that's a speech-driven statute of prohibition on libel because you can't make up lies about other people. You are prohibiting the content of the speech, but there's a harm there.

And the harm is, obviously, that whenever the person you would be lying about is injured or, you know, embarrassed or becomes emotional about what you said.

So there's obviously always a harm. So the question can't be, you know, is there harm or not? That's just a false dichotomy. And if that were true, then we might as well say, you know, the emperor has no clothes.

And what we're really doing is just decided which speech we really don't like versus which speech we just kind of don't like. So what's the actual division? And, Judge, our position is that division is this: The first category are those

statutes where the harm is dependent on the content of the speech.

And, conversely, the second category is those where the harm is either not directly dependent on the content on the speech or is what we might be referred to as sort of secondary effect.

And I guess to sort of start illustrating the distinction between those two is using some examples. Category 1 examples, there's a couple I want to mention and then a couple Category 2. So one of the big cases is State v. Chantinelli (phonetic), which both parties cite in their briefs.

That statute prohibited promoting unlawful sexual conduct. And it prohibited and criminalized acts only when they occur in an expressive context.

And the Court of Appeals -- or the Supreme Court said, "That statute primarily, if not solely, is directed towards the expressive conduct -- the expressive aspect conduct that it describes."

So what they were trying to stamp out were these live sex shows. And, obviously, that has a strong expressive component. When somebody is putting on a live sex show, they are expressing

themselves and that is a form of speech.

And the Court looked at it and said, "The only way to violate this statute is if you are performing this live sex show. The content of your speech is your live sex show and that's what we are stamping out."

So it's -- the content of the speech is dependent on whether this harm occurs. And the harm is, obviously -- well, I mean, not obviously, but we can presume the harm is some sort of decaying the moral fabric of society through a live sex show, something like that, because no other harm that was really made.

On the far side of things in Category 2, you know, we're looking at what kind of statutes fall there. Some of the big examples are Menacing. The State of State v. -- the case of State v. Garcias (phonetic), the Court of Appeals looked at that and said, "Okay. What is the harm and what is the speech component? Are they dependent on each other or are they separate?" because, obviously, you can menace somebody in many different ways.

You can menace them through your words. You can make a verbal threat that causes someone that immediate fear and harm or you can do it physically

with actions, something like that -- which would be a more expressive, non-speech way to go about things.

But no matter how you -- or what conduct of speech you engage in, that's not the harm they're getting at. The harm they're getting at is the threat that the victim feels and it is therefore separate and distinct from the content of the speech.

Another good example, State v. Betnar (phonetic), which is Oregon's child pornography case. The case was challenging the encouraging child sex abuse statute. And they said, "No. It's free speech to distribute these photographs."

And the Court says, "No. This statute clearly gets at stamping out separate and distinct harm." We don't care what your or whether your disseminating or anything like that. We're not trying to stamp out your speech.

The forbidden effect we're trying to stamp out is the fact that to make child pornography, a child must actually be abused. And that is a separate harm that occurs before any speech occurs. So the forbidden effect is not dependent on the content of the speech.

And so then kind of turn to this case -- or this -- this statute. The question is: Is the

harm whatever Legislature is trying to stamp out dependent on the content of speech? And, Judge, it clearly is.

The statute specifically only says that the dissemination of an intimate image is prohibited through an internet website. And the harm that the State is apparently trying to stamp out is the embarrassment, the harassment, the emotional impact that speech has on the person in the photo.

And, thus, the only way to achieve the forbidden effect that the Legislature is trying to stamp out is to prohibit this specific content of speech because you can put up a picture of your ex doing something embarrassing or looking ridiculous or, you know, you can put up a picture of your ex, you know, saying hateful, racist things.

Any of those would cause embarrassment, injury, harassment, the same thing this statute is trying to stamp out and it wouldn't be a crime. The only thing that's going to end with you in custody is if it's an intimate image. And thus, the statute is clearly focusing on content of speech.

And that's pretty much the end of the analysis, Judge. It is clear that the statute falls within the first Robertson category. And that's the

only way it can survive constitutional scrutiny, is if it falls with some historical exception, which, as I had mentioned earlier, does not appear to exist.

I don't believe any of the parties here have any argument to that effect. I'm happy to respond to it if they do, but I am unaware of such. Turning to the federal analysis -- and there's a point I want to be very clear on here sort of in between those two.

The State floats this idea in their brief about how, you know, the Oregon Constitution is often said to be more robust, more expansive than the federal Constitution. And thus, they say, "If it passes constitutional scrutiny under the Oregon Constitution, it must be lawful under the First Amendment."

That is not any basis to cut off a federal analysis. That is not at all how constitutions work. These are two wholly distinct sovereigns, two wholly distinct documents and sets of rights that my client has.

So an analysis under the First Amendment is absolutely appropriate and required. So turning to the First Amendment side of things, the State -- and I -- I'm starting in a responsive fashion because

it's required for the analysis.

The State, in their brief, kind of blows right past the first step of a constitutional First Amendment analysis. Every single First Amendment case makes clear that the very first thing you do when speech is raised, is determine whether it is content based or content neutral.

And I guess to back up a minute as a quick caveat, obviously the same idea that this focuses on dissemination of photographs is the same reason that the First Amendment applies, as does Article I, Section 8.

And so the whole content based versus content neutral, the question is -- and, again, I'm going to quote here, "Content-neutral statutes are those that are justified without reference to the content of the speech."

And that's from Buss v. Barry (phonetic) which I am going to discuss more in a minute and I cite in my brief. "Conversely, content-based statutes are those that regulate speech due to it's potential primary impact, those that focus on what is being said."

And, again, this statute is clearly content based. And I want to talk some about a

couple cases which made that very clear. One of the big cases that I think is very important in this case -- and I actually came across it in researching a response to some of the things that Ms. Kebler wrote.

It's the Simon & Schuster v. The New York State Crime Victims' Board. That was the Son of Sam case. Very quickly, the Son -- if the Court's not familiar, the Son of Sam laws were adopted after the Son of Sam serial killer in New York sold the rights to his memoir, his account of -- of his crimes.

And he made a bunch of money off of it. And similar to the revenge porn case, that happened and then all of a sudden, states across the country adopted these Son of Sam laws where they said, "No, no, no. If you have been accused or convicted of a crime and you are trying to sell or profit off of an account of that crime, then you don't get to keep that money. We get to take it."

And the took it for various reasons and different schemes. In the New York one, they said, "What where going to do is take all the money for five years, place it in escrow and then we're going to use that to pay off the victims of your crimes,

their restitution," things like that.

So the Supreme Court looked at this statute and they said, "Is it content based or content neutral?"

And it was clearly content based because, although there was this forbidden effect, you might call it, or a secondary effect that the State argued it was trying to get at, which was recompensating victims for crimes, the statute clearly, by its terms, said, "What can't you sell? You can't sell an account of the crimes you committed."

You can sell a -- a cookbook, a -- a fancy novel, anything like that. You can't sell an account of the crimes you committed. And here, the statute is, for all intents and purposes, identical. What can't you disseminate under our statute? Intimate images.

What can you disseminate? Anything else you want. So this is clearly a content-based statute. Another couple very brief similar statutes, the United States v. Stevens that was the animal crush video case from 2010.

And that was a state -- case where the federal government passed a statute saying, "It is

unlawful to create, possess or disseminate depictions of animal cruelty."

And what they were trying to get at was this fetish called animal crush videos where a woman puts on high heels and stomps a small animal to death that, for some reason, people find that to be erotic and desirable.

Similar to this case, very few people would think that is desirable or a good thing. Similar to this case, there are perhaps distinct harms that aren't actually contemplated by the statute. In that case you've got, sure, animals are abused.

This statute directed at speech doesn't stop animals from being abused. Similarly here -- and Ms. Kebler and, I believe, the State float a great deal of argument about abusive relationships and things like that. But there is no requirement under the statute that any relationship exists to begin with and, number two, that it be abusive.

So are there possible harms that could be effected by both of these statues? Yes. But getting back to my point, the Supreme Court looked at the animal crush video statute and said it's clearly content based. What can you not create, possess or

distribute? Depictions of animal cruelty.

Here, again, we're talking about images. This is a content-based statute, Judge. The State, when they fly past that argument, goes straight into an expressive conduct analysis, the O'Brien (phonetic) test.

The O'Brien case and cases that cite it are about this federal idea of expressive conduct. And what you're looking at there -- and I guess it's most clearly illuminated when you just discuss what O'Brien was all about.

O'Brien was the draft card burning case. There was a statute that said, "It is unlawful" -- and this was during the Vietnam War. It is unlawful to destroy, mutilate or otherwise dispose of your Selective Services card."

The reason for that statute's clear. The government's running a draft. People have to have their draft cards and know what's going on. Nowhere in that statute does it discuss speech.

We're talking solely about conduct, conduct specifically of mutilating or destroying your draft card. Now, that type of conduct can have a speech component.

Mr. O'Brien himself, took his draft

card, went outside a draft office and burned it in front of a bunch of people. He clearly is making a political statement there through his conduct and thus, he's engaged in expressive conduct.

But, Judge, that whole line of cases, that whole line inquiry requires that a statute be content neutral before you go down an expressive conduct analysis. And the statute there clearly was content neutral because you're not talking about any form of speech.

You're regulating conduct, which is, you cannot destroy your draft card. Again, here, there is no such content neutrality. The statute strikes at one thing: Dissemination of intimate images. So we are in a content-based analysis very clearly.

The analysis for a content-based statute is this: You first look at, does this conduct fall into any of the recognized unprotected categories of speech? And, again, that's obscenity, fighting words, incitements, true threats, child pornography. It's a list.

It is a short list and I don't believe either party is going to content that -- assuming this is a content-based regulation on speech, that it falls into any of the unprotected categories 'cause

it simply doesn't.

What we are talking about is consensually exchanged, non-obscene photographs. There is no threat aspect to it, which would, you know, qualify as a true threat.

There's obviously a pretty high standard of showing under a true threat analysis. I don't believe that is remotely contemplated. So if we're not in a category of unprotected speech, but we have a content-based regulation, the test is (indiscernible) originally drawn from the equal protection. Jurisprudence has a long history of First Amendment applications.

The test is this: It is -- it is described in some cases as two-part test and sometimes a third component is added. But the basic test is, question one: Is the statute necessary to serve a compelling government interest?

Number two: Is the statute narrowly tailored to achieve that interest? Do the means appropriately hit at the end? And then third, the sort of one that is or isn't used, is it the least restrictive means? Because often, narrow tailoring and less restrictive means are two of the same.

However, narrow tailoring requires

analysis of both over-inclusiveness and under-inclusiveness. So least-restrictive means is a sort of secondary factor to consider. So then you're at the question of, okay. What is the compelling government interest?

Is the statute narrowly tailored and is it necessary to serve that compelling government interest? And, Judge, the State gets at this when we're talking about compelling interest and what is the government interest. You an refer to it as a government interest or a harm or a forbidden effect.

They refer to secondary effects of speech. And I think that is a very important thing for us to address in this case 'cause it is addressed in the State's case Renton (phonetic) that they describe.

It is also addressed in the Simon and Schuster, the Son of Sam case I discussed, as well as the Buss v. Barry case and RAV v. City of Saint Paul. And I think some discussion of those cases will illuminate what I'm getting at very well.

So I talked about the Son of Sam case. That is where the language sort of begins where the government's talking about compelling interest.

In that case, the Crime Victims' Board,

who had imposed this statute about taking people's restitution, they had to come up with compelling interest to justify this statute.

And the Supreme Court makes a very clear line. And they say, the Board doesn't even try to float the idea that protecting the victims of the crimes, of which the story is written about, that protecting them from being revictimized by having these accounts of the crime spread around, is a compelling interest.

The Board doesn't even try and make that their compelling interest. And the reason for that is that since Buss v. Barry, which I'm going to talk about in a second, the Supreme Court has recognized that the emotional impact of speech on the people it affects is not a compelling government interest.

It just simply does not qualify. And that goes back to the robust nature of the 1st Amendment and the fact that we do not criminalize speech just because people don't want to hear it or are embarrassed by it.

Now, Judge, Buss v. Barry is the second case that I think is very important to this -- this case. That's an older case. The issue there was Washington, D.C. had adopted this statute that said,

"It shall be unlawful for any person to go within 500 feet of a foreign embassy or ambassador and display a sign or -- or any sort of form of protest that brings that foreign government or the ambassador into public odium or disrepute."

So that, again, they looked at it and they said, "What is the compelling interest?" And the Court had this to say, "We have indicated that in a public debate, our own citizens must tolerate insulting and even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.

"A dignity standard, like outrageousness, is so inherently subjective that it would be inconsistent with our long-standing refusal to punish speech because the speech in question may have an adverse emotional impact on the audience."

So, again, Judge, they're getting at the idea that speech's emotional impact on the person it is directed towards or who's affected by it is not a compelling government interest.

And this idea is really wrapped up very succinctly in the third case I want to talk about, which is RAV v. City of Saint Paul. And, Judge, that was hate speech case, where the City of Saint Paul,

had a adopted this statute.

The statue says, "Whoever places on public or private property a symbol, an object, et cetera, including, but not limited to a burning cross, or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender, commits Disorderly Conduct."

And that statute -- I'm going to talk about the secondary effects in a minute. But that statute, we -- our position is, is highly analogous to the case here. You, again, have speech, which we all agree, doesn't further a political debate. It doesn't have very much merit in public discourse.

Burning a cross or displaying a swastika is obviously morally reprehensible. That isn't the analysis. And it doesn't save such a statute to talk about the effect that it has on the people who view it.

And we certainly recognize the effects that a lot of speech have on people can be difficult, can be extremely embarrassing, emotional, all those types of things. But that isn't the legal test.

And the very important part -- and this

gets to the compelling government interest and what we're talking about. The Court talks about the supposed secondary effects of speech.

They say this: "The City of Saint Paul argues that the ordinance comes within another of the specific exemptions we mentioned. The one that allows content discrimination aimed only at the secondary effects of speech," which is the argument that the prosecution is floating in this case, that the secondary effects, the embarrassment, are compelling government interest.

According to Saint Paul, "The ordinance is intended not to impact on the right of free -- expression of the accused, but rather to protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against."

Even assuming that an ordinance, which completely prescribes rather than merely regulates a specified category of speech, can't ever be considered to be directed only at the secondary effect of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of Renton, the case on which the State

relies.

And this is the most important part. As we have said in Buss v. Barry, "Listeners' reaction to speech are not the type of secondary effects we referred to in Renton. Even motive, impact of speech on its audience is not a secondary effect."

So, Judge, that is the problem with compelling government interest here. There are also a great number of problems with narrow tailoring. And I discuss these at some -- some length in my brief, so I'm not going to go deeply into them.

But I talked some earlier in this argument about the internet and the world in which we are presently living. The internet does a lot of great things. It also does a lot of bad things. And the manner in which people relate to the internet is constantly evolving.

You know, we look at things like government surveillance. We look at discussions about privacy on social media. People who choose to engage with the internet, to a certain degree, assume a level of risk.

When we put things out into the world via phones with internet capability or we put them on our Facebook or websites or whatever we do, we

understand that it is difficult to take that back.

And that particularly applies, unfortunately, to pornography, given that it's very clearly demonstrated that society as whole has a great interest in pornography. People love it. It is the subject of, you know, the old saying, half the internet is pornography.

People don't like to talk about it. People don't like to admit it. But it's very clearly true given how much of it is out there.

And, in particular, when we talk about things like sex tapes and pornographic pictures, you know, going back to the earliest days of the internet, people realized that when you're floating pornography out there in the world, it gets out and people look at it.

You go back and look, you know, at the beginning with the Tommy Lee and Pamela Anderson, Anthony Weiner, every year, there is people's pornography that gets out there because people realize when you start distributing your pornography, it gets out.

And that is unfortunate. And, again, I have no doubt that people are the feature of that feel embarrassed and humiliated, no doubt. But it is

a risk people have to understand at this point.

And, Judge, the other big problem with narrow tailoring in this case is that the statute is not narrowly tailored to serve this purported interest.

The alleged interest is clearly, you know, preventing this humiliation, embarrassment, that kind of thing. But the statute only applies to internet websites.

So somebody who is in possession of these intimate images can send them in the mail. They can text them, they can, you know, put up a billboard on I-5. They can put them out anyway they want. The only they can't do it is on a internet website.

And, thus, if what we're trying to get at is preventing this embarrassment and things like that, the statute is not narrowly tailored to do that because there are so many alternative avenues that, again, do not land somebody in custody and are not a crime. It's only a crime when you use the internet.

So, Judge, our position is that this statute, while admirable in what it is trying to achieve, does not satisfy constitutional tests. We're asking you to strike this statute down.

I'll reserve any other remarks for my rebuttal.

THE COURT: Thank you.

Ms. Atwood.

MS. ATWOOD: Thank you, Judge. So I will take kind of a similar approach to the State's arguments in this case, first going through the step-by-step analysis of most of what we laid out in our briefing. And then I want to respond specifically to some of the -- the points that defense counsel has brought up today.

We are in agreement that this, at least, insofar as we're talking about the Oregon Constitution, requires Your Honor, to perform a Robertson analysis.

Obviously, as you can tell from the State's response and from defense counsel's arguments, we highly disagree on which category this -- this kind of statute would fall under -- under State v. Robinson -- or Robertson, sorry.

And I want to start, I guess, by explaining the reasons why this is clearly, without a doubt, on its face, a Category 2 statute and then follow that up with some distinct situations where the Court has discussed Category 1 statutes.

So as we have identified in our brief, there are some lines that the Oregon Court of Appeals and the Oregon Supreme Court have drawn when determining where a statute falls in the Robertson framework.

And just at the outset, the State disagrees wholeheartedly with the defense that there is some sort of confusing or baffling magic that goes on in the Court's mind when deciding what category to place a statute in.

This -- the case law in question clearly shows exactly where that line is drawn and it's at whether or not the government is aiming the statute, either on its face or implicitly, but obviously, toward a distinct secondary harm.

There are a number of cases that stand for this proposition and I want to go through a couple of them for you. I guess just to list the names that the State has mentioned in it's briefing, Babson (phonetic), Rangle (phonetic), Plowman (phonetic), Rae (phonetic), Moyle (phonetic), Garcias, Stoneman (phonetic), Betnar.

All of these cases stand for the proposition that when a statute facially -- even if it discriminates against a certain type of expression

based on content, if the statute, on its face, prescribes a harm as the -- the true effect that the -- that the government's trying to achieve or if, in the case similar to the child pornography statutes, if the harm is implicit in the act itself, those are Category 2 cases.

And to just point out just a couple of analogous situations to what we're dealing with here, State v. Rangle in particular, I think, is instructive to the Court today. That involves the stalking statute.

The Court identified the fact that stalking requires, if you're going to talk about communicative conduct or contacts, that a person has to communicate some sort of threat to another person. That, even in defense counsel's own terms, would constitute a content-based restriction under the stalking statute.

However, what the court concluded in that case was that the fact that the statute prescribes, along with a person's intent to cause fear in this person, a reasonableness of the fear in the victim, that it was nevertheless constitutional.

So in Rangle, even though a distinct type of communication was being proscribed, that was

still a Category 2 case. I would also point out just as kind of first step in this line of reasoning that Robertson itself was a Category 2 analysis of -- of the Coercion statute that existed at that time.

And if I could point out a specific quote that the Court in that case states, they made it very clear that it's virtually impossible to commit the crime of Coercion without using expression. "Expression based at a demand" is -- is the term that they were specifically fixating on.

The Court even notes that, "Speech would be the offender's only act in committing this crime in most situations." So the idea that the line that has to be drawn is whether or not a crime can be committed without the use of speech is wholly against what the Court in Robertson stated regarding the Coercion statute.

So at the outset, we disagree with how defense counsel has explained the process through which this sort of classification takes place.

In addition to Rangle and Robertson, the Court in Plowman was discussing the intimidation statute, which, of course, requires conduct that is specifically directed at somebody's race or sexual orientation or something like that.

That's being content based.

Additionally in State v. Moyle, that statute involved threats made to a person, but it delineated that the forbidden effect that was stated in the statute was actual and reasonable harm.

So, again, it -- it's really -- there's no question where the Courts are coming down on how to categorize something under the Robertson analysis.

The question is whether, on its face, the statute proscribes a harm that's supposed to be real end, the speech being the means, or whether, as in the line of child pornography-related cases, the harm is so implicit in the nature of the act itself.

And that brings me to those -- that line of cases dealing with child pornography, which, as I've stated in our briefing, actually broadened the scope of Category 2 under the Robertson test.

So the cases I'm talking about specifically are Stoneman, Betnar and later -- let's see. I think it appears in defense counsel's briefing. Demmock (phonetic). These are all Encouraging Child Sex Abuse cases or cases otherwise involving the possession or distribution of child pornography.

When you think about the nature of those

statutes themselves, they are content based and cannot be committed. Those violations cannot be committed without the use of expression. Disseminating child pornography requires the expression of something that is content based.

You could disseminate anything else, in defense counsel's own words, and it wouldn't fall under that statute. So for all of those reasons, before I even get into why this statute surpasses constitutional muster in the State of Oregon, I would just state that I think that the Court needs to approach this case the same way that the Courts have approached all of the cases leading up to this point.

As you can see, if you actually want to look at the Unlawful Dissemination statute, it's lengthy, to say the least. It covers about two columns of the statute book here.

And it clearly requires not only that, you know, dissemination of a -- a particular type of image occurs, but it requires that the person do so with specific intent to harm another person, that the other person actually be harmed and the harm actually be reasonable.

So on its face, the statute is a Category 2 statute. And there's no question that

Category 1 does not apply in this situation. On that note, I kind of want to transition into just barely discussing some of the Category 1 cases that defense counsel mentions in it's briefing and it's argument, particularly Chantinelli (phonetic) and Tidyman (phonetic).

And we've also -- also mentioned another case in our briefing, Hillsboro v. Purcell. Those cases are, very clearly on their face, distinct from the type of statute that we're dealing with here.

In the City of Portland versus Tidyman, the ordinance at issue was a city ordinance prohibiting adult business from located within 500 feet of other adult businesses or residential or school zones.

There was no, on its face, secondary harm mentioned in the city ordinance. And, therefore, it had to be categorized under Category 1. Similarly, in State v. Chantinelli, the statute in the case involved the operation of a live sex show, as defense counsel pointed out.

But the Court noted specifically that it was facially unconstitutional because it was not aimed at a particular harm and therefore had to analyzed under Category 1.

Similarly in Hillsboro v. Purcell, the Court struck down a city ordinance that criminalized door-to-door solicitations.

And the court in that case specifically noted that the face of that ordinance didn't prohibit them based on certain time, place or manner restrictions, whether it involved consent or any particular intent in making these solicitations.

All it did was prohibit a certain type of expression and communication without delineating a secondary harm. Those cases, for obvious reasons are different from the stype of statute we're dealing with here.

So once we've established that this revenge porn statute, ORS 163.472, falls under Category 2, the next step in that analysis is overbreadth. The overbreadth test is discussed pretty thoroughly in a lot of the cases that we've cited.

But, essentially, what it requires you to decide is whether or not this statute can be violated without -- how -- how should I frame this -- how -- violated in such a way that otherwise-protected expression would be implicated without creating this necessary harm.

So there's a lot of case law dealing with overbreadth, just as there is dealing with how to classify statutes.

And a couple of the things that I want to bring up to you first are the ones that Oregon courts have deemed to be unconstitutional. I want to start with the -- the line of cases like State v. Maynard (phonetic).

In that case, it was a statute prohibiting furnishing of obscene materials to minors, which, in some respects, I guess you could find analogous to the type of thing that we're dealing with in child pornography statutes.

However, the Court in that case, determined that the -- the actual text of the statute didn't sufficiently delineate what it meant to furnish something to minors and -- and for what particular reason the furnishment [sic] should be illegal.

The -- the cases in line with State v. Maynard include State v. Johnson and City of Salem v. Laurow (phonetic). Those cases also dealt with overbreadth analysis under Category 2.

In Johnson, the Court was trying to decide whether or not portions of the Harassment

statute were lawful because they prohibited a person from insulting another by abusive words or gestures in a manner intended or likely to provoke a violent response.

Similarly, in City of Salem v. Laurow, a municipal ordinance was at issue that prohibited a person for, essentially, receiving a fee for watching somebody else perform a sexual act with another person.

And in that case, the Court, again, explained that although this is a Category 2 analysis, what they're trying to prevent is people making money from this sort of obscene behavior. The statute itself was unconstitutionally overbroad because it regulated expression and couldn't be narrowly construed.

What we're getting at here is the fact that this statute, the Unlawful Dissemination of an Intimate Image, as defense counsel correctly pointed out, does a pretty good job of narrowing itself.

It not only requires intent, reasonableness, actual harm, non-consent, a certain type of image disseminated in a certain type of way, it also gives a laundry list of exceptions for situations that don't constitute Unlawful

Dissemination of an Intimate Image.

And it adequately defines each and every term that it uses when -- when delineating what type of behavior would constitute a violation of the statute.

So, unlike the types of statutes that we're dealing with in Maynard and Johnson, where things like "insults" or "furnishing" weren't adequately defined, this statute does adequately define the type of behavior that it intends to be prohibited.

And it's worth noting that in State v. Maynard, that initial statute, the Furnishing Obscene Materials to Minors, after that case came out, the Oregon Legislature went back, got rid of that statute altogether and then created two new statutes that were, let's see, 167.075 and 167.080, Displaying Obscene Materials to Minors and Exhibiting Obscene Materials to Minors.

These statutes were created for the purpose of adequately defining what type of behavior the Legislature intended to prohibit. It's our position today that the statute, as it is, already sufficiently defines the kind of behavior that it intends to prohibit.

So the next line of cases that I'd like to point out as -- as they relate to overbreadth, in addition to Rangle, is Garcias. I think that the Court will find that case to be particularly illuminating on this point.

The Menacing statute was at issue in that case. And even though that statute was attacked for potential overbreadth, the Court found that because it required actual harm, imminence, seriousness of the actual harm and the implicit hostility between the two people involved, that the Menacing statute wasn't overbroad.

And at this point, I think it's worth noting how similar that is to the line of cases involving child pornography. What the Court decided in cases like Stoneman was that we're not looking, necessarily, at a statute in a vacuum when we're determining if it's overbroad.

What you have to do is look at the context of the statute and the legislative history that -- for all the considerations that were made when the statute itself was enacted.

And, in this case, I think I would point out that counsel for the victim has supplied a whole lot of very valuable information, along with their

response to defendant's demurrer.

The State would adopt -- not only adopt their arguments, but also urge the Court to look at some of the material they've provided.

The Oregon Legislature was exhaustive in enacting this statute, meeting with multiple groups, including the ACLU, for months on end to try to determine the best way to tailor this statute to avoid these exact kinds of challenges.

And by making the statute not only account for certain exceptions like -- and -- and I'll get to these in a minute -- but the, like, Anthony Weiner-type of situations or celebrity-sex-tape type of situations, those, in our opinion, might fall outside the statute.

And the Oregon Legislature clearly took these things into consideration and not only by delineating exceptions and definitions within the statute, itself, but by framing the statute as analogous to things like the stalking statute in State v. Rangle. It insured that it was going to pass constitutional muster.

So the next thing that I would like to address is defense counsel's assertion that the State is kind of resting on its laurels as far as the

Oregon constitutional analysis is concerned.

We did include a footnote in our response to defendant's motion that -- I mean, time and time again, Courts have said that the Oregon First Amendment protections usually exceed federal First Amendment protections.

And if Your Honor were so inclined to agree with that statement, then we don't think, necessarily, that there would be any grounds to find that this was unconstitutional under the First Amendment of the United States Constitution.

However, and as you can see in our response, we did go through a lengthy response to that portion of the arguments as well, which I will move on to at this point. So this is where things get a little bit sticky because, again, we disagree with the way that defense counsel is urging the Court to approach the analysis from the get go.

The First Amendment obviously does require the Court to determine whether or not a certain type of expressions is content based or content neutral.

However, the cases that the State has cited clearly show that even where specific forms of content are regulated, that that statute can be

based -- can be determined to be content neutral based on the fact that it is neutrally aimed at a secondary harm.

And the exact case that I would like to point Your Honor to -- let's see here -- to illustrate this proposition is -- let's see. Okay. Ward v. Rock Against Racism, 491 U.S. 781.

The Court emphasized in that case that the consideration that should be -- like, the foremost consideration with determining whether or not these kinds of statutes are neutral is the government's purpose in enacting them.

And this is a direct quote: "A regulation that serves purposes unrelated to the content is deemed neutral even if it affects speakers of some messages, but not others."

That is exactly what we're dealing with here. As with the child pornography line of cases, as with anything dealing with expression based on race or sexual orientation that causes secondary harm, this is a scenario where a certain type of content is being affected.

But because the harm is the focus of the statute, this should be analyzed under the O'Brien framework. The O'Brien test itself is kind of a

less-stringent version of the strict-scrutiny analysis. So I guess I would begin with the strict-scrutiny test, just to get that out of the way.

But it is our position here today that this is not a strict-scrutiny situation. The test for strict scrutiny, obviously, is whether or not there's a compelling government interest and whether or not the statute is narrowly tailored to achieve that interest.

And there's a couple of points that I'd like to make to that end. First, in response to the cases brought up by defense counsel, RAV and Buss v. Barry, not only to -- that they brought up to support the idea that this should be a strict-scrutiny analysis, but to almost, like, immediately strike down this statute, I would like to point out that those cases are basically inapplicable for this particular issue.

So those statutes involved effect on the listener. This statute involves effect on a targeted victim. There's nothing in the Unlawful Dissemination statute that would prohibit someone from furnishing or disseminating any type of information or speech based on its effect on the

listener.

Those -- those statutes in those cases forbid the things that they forbid because of some hypothetical public nuisance or discomfort that the speech would cause. That's what was at issue in those cases and that's not the type of statute that we're dealing with here today.

What we're dealing with here today is a crime that involves the targeting of a specific victim, the nonconsensual dissemination of sexual images of that person with the intent to harm them, that it actually does harm them and that that harm is reasonable.

It's not analogous to the -- the line of cases involving a vague threat of discomfort posed to the public who hears a certain message. So just at the outset, I think that those cases are inapplicable in this situation.

However, ever so far as narrow tailoring is concerned for a strict-scrutiny analysis, as I've already pointed out, the statute almost exhaustively defines and delineates the type of conduct that we're talking about here.

And I think it's helpful to go through some of the hypothetical situations that defense

counsel brings up in argument and in their briefing to show that this is a narrowly-tailored situation.

The celebrity sex tape or Anthony Weiner argument, that if you put it out there, it's your own fault if it gets disseminated further. Okay. So to begin, the celebrity sex tape and the Anthony Weiner analysis kind of fails at the outset because we're talking about celebrities and public figures.

So the portion of the Unlawful Dissemination statute requiring that it's reasonable that a person be truly harmed by this conduct could fail in those situations.

Is it reasonable that a person who is always in the public eye and constantly being scrutinized and is used to every stone being overturned about their private life, is it reasonable for that person to feel harm from this type of conduct?

Additionally, defense counsel makes some interesting arguments that, more or less from the State's perspective, amount to little more than victim blaming for this type of situation.

If -- to say that if a person gives an image to somebody, that they give up any right to be offended for disseminating that image further is

completely, I guess, backward from a lot of other crimes that we deal with here in -- in -- in our community.

For example, if you lend your car to a friend for a day and they never bring it back, it's not your fault for giving them permission initially. They're still guilty of Unlawful Use of a Vehicle.

If you tell someone to hold your purse for you while you go use the restroom and that person takes off with your wallet, it's not your fault for letting them handle your purse. They're still a thief.

If -- if a -- if a girl allows her boyfriend to kiss her and he rapes her against her will, it's not her fault for allowing physical contact. Again, this amounts to little more than victim blaming and it completely disregards one of the main and -- and vital portions of this statute, which is nonconsent.

So scenarios where, you know, Joe Blow gets on Tinder and sends nude selfies to every other girl that he finds there, complete strangers, it's not reasonable for those girls not to think he didn't consent to that image being put in public.

We'd never be able to prove that case.

This statute targets a very narrow set of conduct that causes a very narrow type of harm in very narrow circumstances. And I think defense counsel's argument that this statute refers only to disseminating images over the internet is a testament to that.

That's not a -- a -- an -- an argument that you can make for overbreadth. That is a provision included in this statute that narrows it to particular situations.

And it's a testament to the fact that things that are disseminated -- disseminated over the internet are almost impossible to take down and can reach hundreds of thousands of people in the course of a couple of hours.

So the statute adequately defines the type of harm that it's trying to prevent here. We're not dealing with someone handing out, you know, 20 flyers of -- of an image that someone might be embarrassed by.

The internet is a particularly difficult and potentially extremely harmful weapon that another person can use against a victim. And this statute adequately helps protect Oregon citizens from the type of conduct that they shouldn't have to be

subjected to.

People should not have to be subjected to -- to embarrassment, humiliation, job loss, personal harm, emotional distress, regardless of whether or not they may have, at some point, consensually made an image with another person.

And I think that the quote listed in the State's brief from State v. Moyle absolutely gets at this point. The Oregon Legislature and the Oregon Court of Appeals and Supreme Court have stated that this is a -- a compelling State's interest, as far as the harassment statute was concerned in that case.

The object of the criminal law was to punish abuses that cause a private harm, alarm of another person, in lieu of or in addition to civil remedies for the injured person.

Protection of individual as well as societal interest and a sense of personal security among the citizenry is a classic objective of law. And Oregon law has been no exception.

Since its earliest enactments, the Oregon Legislature has sought to preserve a sense of personal security among the citizenry. So, again, there's no question whether or not this would be a compelling State interest to preserve its citizens'

well being.

And the line of cases that defense counsel points out, RAV and Buss v. Barry, are completely -- I guess, miss the point. They're off base for a couple of reasons.

So the last thing that I would like to bring up, once we're past the strict scrutiny argument, which, again, the State does not think applies in this case, is the State's position, which is that this is an O'Brien analysis.

O'Brien involves a line of cases where a statute or an ordinance or a civil provision prohibits a certain type of expression, mostly based on the particular type of -- sorry -- content in the expression.

But, in those cases, the statutes were aimed ar proscribing some secondary harm. The cases that the State mentions in our briefing and a couple of others include Renton, Erie v. Pap's, Ward, Clark v. Community for Creative Nonviolence.

These all involve that exact type of secondary harm that we're trying to prevent with the Unlawful Dissemination statute. So to get into the O'Brien analysis, I want to start by talking about O'Brien itself.

Defense counsel does point out that this was a draft card burning ordinance or a crime that the defendant was convicted of in that case. And it's worth noting that that is content based. He didn't get in trouble for something else, he got in trouble for burning his draft card.

It's a specific type of content involved in his expression that he was convicted of. And, nevertheless, in that case, the Court found that the statute was constitutional and his conviction was upheld because there was a secondary aim for the statute itself.

And the aim, even though the Court noted that maybe it was kind of a proxy, the government argued in the case that it was the ability -- the government's ability -- to regulate the Selective Service. And that was enough of a compelling interest for the statute to stand.

This -- the framework that they came up with in State v. O'Brien is, first, whether or not the regulation itself could be within the government's power and it -- does it -- does it further that government's interest?

Second, does the -- the government's interest have a specific relation to the expression,

itself? And, finally, does the regulation restrict speech greater than is necessary to achieve that goal, which is, essentially as we've stated, another overbreadth analysis.

For the arguments I've already made, I -- I would just rest on those to reiterate the fact that the government clearly has an interest in maintaining the well being of its citizens and that that's within the government's power to do so.

Otherwise, we wouldn't even have statutes like Harassment or Menacing or Coercion or Stalking. And defense counsel's assertion that it's not important to protect your citizens' emotional well being is just misplaced.

As far as the next step in the O'Brien analysis is concerned, the question is whether or not the interest is related to the expression itself.

And what the State was trying to point out in our brief is that there's nothing -- there's no -- there's a disconnect, I guess, in most of the cases that follow O'Brien between the type of expression that we're talking about and the type of harm we're talking about.

The defense correctly points out the fact that the -- the dissemination of intimate images

can occur in a number different avenues and wouldn't fall under the statute, which I think kind of concedes the point that we're not talking about the content of the -- the dissemination itself as the focus of the statute.

The focus of the statute is the type of harm that results from conduct, from doing what you're doing on the internet. Finally, the last part of the analysis, again, is the overbreadth portion of the framework.

The -- let's see here. As far as O'Brien is concerned, there are a couple of cases I'd like to point out as far as the overbreadth arguments go, the first one being the Texas v. Johnson case, 491 U.S. 397. This was a flag burning situation.

Someone was convicted for burning a United States flag and he invoked his First Amendment rights on appeal. The State, in that case, agreed. This is expressive conduct and it totally depends on the particular content. You're not in trouble for burning something else.

However, the reason the court noted that the statute in that case was unconstitutional was because they didn't make any record -- there was no assertion in the statute or in the legislative

history -- of some sort of harm that would've been prevented by enacting the statute, itself.

So, again, this is analogous to the Oregon framework laid out in Robertson that when you're dealing with a statute that creates a content-based restriction for the purpose of preventing a secondary harm, you have to make the harm clear.

And in this case, we do. So the line of cases I've already mentioned that fall under the O'Brien analysis, Renton v. Playtime Theaters, City of Erie v. Pap's and Ward v. Rock Against Racism, are all fairly analogous to the case at hand.

And most of them even deal with things involving public indecency or sexual or nude conduct or content of speech. In Renton, the -- the ordinance in question there was, one, again, prohibiting adult theaters from locating within a certain distance of residential or school zones.

And the ordinance itself specified that it has to be an adult movie theater. Again, we're talking about content, not other types of movie theaters or stores at issue there. However, the Court found that the secondary effects were the main issue.

When the Legislature enacted the statute itself it was clear they were trying to prevent the harm, not necessarily the content, of the speech. And it was upheld.

Again, in City of Erie v. Pap's, the -- the statute involved there was Public Indecency, which we also have here in Oregon, which was, the Court conceded, aimed specifically at nude -- or nude expression, but it was enacted for the purpose of combatting the harmful effects that that kind of nonconsensual expression can result in.

Finally, in Ward v. Rock Against Racism, that was a -- a regulation involving sound levels during various, like, public activities, protests, expressive conduct.

The Court in that case has a lot of pretty good analysis, particularly reaffirming that a regulation of time, place and manner of protected speech must narrowly tailored to serve the government's interest.

But it need not be the least-restrictive or least-intrusive means of doing so. Ward against Rock v. Racism [sic], in fact, that seems to broaden the scope of -- of the O'Brien analysis to the point where you don't even have to have the least-intrusive

or least-restrictive means in the regulation itself.

So, finally, the last case that I want to discuss is Clark v. Community for Noncreative -- for Creative Nonviolence. In that case, the ordinance or the rule at -- at issue was one that prohibited people from sleeping overnight in certain public zones.

A group, this, you know, Community for Creative Nonviolence was basically trying to stage, not a protest, but an event to highlight the plight of the homeless by doing sleep-in type of things and erecting tent cities and stuff like that.

The Court in that case determined that, yes, clearly, we're talking about a particular type of conduct in a particular type of place. However, the government's interest in maintaining its cities, the cleanliness of its parks and public zones is the focus when we enacted this ordinance.

And that's the reason why it was allowed to stand. If Your Honor were to determine that this was a strict-scrutiny analysis, there's one case that defense counsel cites that I'd also like to discuss. It's United States v. Stevens (phonetic).

And that one, the Court did find that the so-called crush video statute was

unconstitutional as being overbroad. And I think that even if -- again, if -- if you're going to go down the road of a strict-scrutiny analysis, the difference between what this statute and what our statute entails completely highlights that we pass either test in this case.

The government determined -- or the -- the government enacted that statute, obviously, for the purpose of not further disseminating these truly horrific videos and even potentially, and arguably, to discourage their further creation, sort of the similar analysis as we're dealing with in child pornography cases.

However, the focus is on the statute itself. The Court in that case determined that the statute was overbroad based on its language.

In that case, there were several terms used to describe the content of the video that they wanted to prevent from being disseminated or created, particularly things like "cruelty" or "wounding," that the Supreme Court determined, in that case, that weren't adequately defined and could cover a, theoretically, endless amount of types of conduct.

So the statute being overbroad and not providing enough exceptions for when certain things

were permissible, such as hunting videos, you know, humane farm practices, things like that, it was too broad to stand.

So if you're going to go down the strict-scrutiny analysis, I think that contrasting this case with the statute at hand is going to be pretty helpful to you because, again, the -- the Oregon Legislature has gone to extremely lengthy odds to make sure that everything that needs to be defined is defined in the statute and that the particular conduct we're talking about is narrowed on so many different levels, you know, from -- from -- everything from the -- what -- what type of content we're talking about to where it's disseminated, to how it's disseminated, to the lack of consent, to the specific intent, to the reasonable harm.

This is a narrow statute that prohibits a very narrow type of conduct. And even under a strict-scrutiny analysis, it would survive. Unless Your Honor has any other questions for me, I think the rest of our argument is adequately laid out in our response.

And, again, we would adopt the arguments made by the victim's attorney as well as the exhibits provided in their briefing. And with that, I think

that's all I have.

THE COURT: All right. Thank you.

Go ahead, Mr. Taylor.

MR. TAYLOR: Judge, just a handful of things I want to address, a few -- a few State points and then a handful of federal points.

So as I mentioned in my initial argument, you know, we can go through every single Robertson case and argue 'til we're blue in the face about what's analogous and what's not.

There's two cases I simply want to put on the record to sort of cite a rebuttal to what Ms. Atwood brought up. So the first one is State ex rel Sports Management v. Nachtigal, 324 Or 80. That was a statute that prohibited the nondisclosure of trade secrets, right?

So you can't give away trade secrets. Obviously, the harm there is that businesses are harmed when their secrets are given away, right? The Court found that that was clearly a Category 1 Robertson law because the law is, by its terms, directed at a specific subject of communication, excluding some speech, based on the content of the message.

And, therefore, it limits the substance

of a subject of communication. Here, again, extremely analysis [sic]. What can't you distribute? Intimate images.

I also wanted -- the State hang -- hangs their hat on a lot of the Category 2 cases, Garcias, Robertson itself and then Johnson, which are all Coercion, Menacing, intimidation.

And the important thing to point out there -- and I think it's illuminated best in Johnson, which is the one -- it's the prohibiting the abusive speech provision of the Harassment.

What the Court is stamping out there and approving, it's saying that the separate and distinct harm is, is a threat. It doesn't matter what you say or how you say it. It's that the person feels threatened. So there is, again, this separate and distinct harm that is not dependent on the content of the speech itself.

The other kind of second thing I want to point, the State and victim's attorney put a lot of weight into -- well, the Legislature spent a lot of time on this. The Legislature talked to the ACLU about this. That is all true. That doesn't make the statute constitutional.

It is the role of the courts, and solely

the courts, to examine that. The Legislature has had plenty of bad ideas over the years that they thought were great ideas at the time.

And the Courts have routinely struck them down. So the fact that the Legislature spent a bunch of time on this is not a determining factor.

I want to point out just a few of the federal things. First off, returning to the issue of whether we are in strict scrutiny or what is called intermediate scrutiny, which is the O'Brien test Ms. Atwood is asking for.

Ms. Atwood cites several cases, Ward v. Rock Against Racism, United States v. O'Brien, the Clark case and the Renton case. And the unifying theme, particularly of Renton, Clark and Ward itself are that those are time, place and manner restrictions.

And I think Ward is the easiest example because Ms. Atwood cited some language from Ward that would seem to support her position, where the Court is talking about, oh, if you incidentally burn some type -- some content, but not other content, you know, it's okay.

The question is, why is it okay? And unpacking Ward is crucial to that. The statute at

issue in Ward was a noise statute, a volume statute, because Rock Against Racism was this giant outdoor concert and there was a problem with permitting.

And so the argument was that, "We want to have loud rock-and-roll bands. We're going to have all these really loud bands." And the argument was that when they were trying to make it a content argument, they were saying, "Well, this impacts our loud band because we are a loud rock-and-roll band.

"And if we were a, you know, string quartet, we wouldn't be having this permitting problem." And the Court -- the Supreme Court -- looked at it and said, "No. The statute here just says you can't have noise over a certain number of decibels.

"It doesn't matter whether you're a rock band or a jazz band or whatever. What matters is the noise." And it has always been understood that time, place and manner restrictions, where the statute makes no reference to the content it is suppressing, are subject to the O'Brien test, which is, basically, intermediate scrutiny.

And the basic idea is a laundry list of things. It has to be content neutral. It has to leave open ample alternative channels of

communication, things like that, which is why, obviously, you can have laws that say, you know, "No protesting outside the courthouse between 8:00 a.m. and 5:00 p.m.," right?

The government has interest in maintaining a reasonable theory of order. And it's similar to some of the -- the abortion buffer zone cases in the same sense. Those are time, place and manner when you say, "You cannot picket within 500 feet of an abortion clinic."

What is that obviously targeting? Anti-abortion people. But what is the statute saying? Nobody can picket. You can't have a labor picket outside of an abortion clinic.

You can't have a, you know, free the whales protest outside the abortion clinic because, although it may incidentally keep out the only people who are trying to protest outside of an abortion clinic, the statute is, itself, neutral to content.

And the statute here, the revenge porn statute, is clearly not. It only speaks to intimate images. So the one other big point I want to make regarding specific cases, the State brought up Buss v. Barry and RAV v. City of Saint Paul and floated this argument that those were about, you know,

general public disorder.

And they didn't have this particular victim and that this statute, comparatively, has this particular victim we're trying to protect. And, Judge, that just is not what those cases say.

Buss v. Barry which, again, was the protesting outside of embassies and things like that, the whole discussion about what is the compelling interest is protecting the ambassadors and the officials of those countries from public odium or disrepute.

It wasn't about the world in general finding out that, you know, Nicaragua is having a genocide, which is what one of the issues in that case was. It was about the Nicaraguan ambassador being embarrassed and, you know, torn apart and very sad that people were protesting him.

RAV is very similar. The actual facts of that case were that some kids had taken a cross to their neighbor's yard, who were African American, and they set the cross on fire. The statute said you can't do that. There, clearly -- and -- and the statute specifically references "causing alarm to the person that it is directed towards."

So, again, there was, in that case, an

alleged, you know, discrete victim. They weren't talking about how just it's bad for society. They were talking, just like this is, about specific people who are, for whatever reason, whether it's a threat, which you can lawfully prohibit, versus general embarrassment, which you can't.

I will say, at this point, I am still unclear as to precisely what the State has identified as their compelling interest, which I think is important for the Court to do this analysis because at various times -- and perhaps I'm just misunderstanding -- but Ms. Atwood talks about the general well being of Oregonians and their privacy and things like that.

If that is the compelling interest they claim, then the statute's clearly not narrowly tailored and it is wildly underinclusive. There are all kinds of forms of privacy and well being that are not encompassed by this statute.

If the compelling interest is prohibiting specific alleged victims of revenge porn, then I think that is a more discrete compelling -- or compelling government interest, but I don't think that it still survives strict scrutiny based on, you know, everything I already said, so I'm not going to

repeat it.

And then the last case that I want to respond to is Stevens. And Ms. Atwood said, "Well the Supreme Court just looked at overbreadth."

The reason they just looked at overbreadth is because the parties conceded that the statute was content based and they conceded that they weren't really arguing compelling interest.

So the Supreme Court went immediately into the strict-scrutiny analysis and looked at narrow tailoring and said, "This doesn't survive narrow tailoring because it is so wildly overbroad that we don't even need to have any more discussion of anything else."

So, Judge, in the Stevens case, the crush video case, which, again, I think is very analogous, it was a strict-scrutiny analysis. It was a content-based regulation. I think that's all I have for you, Judge, at this time.

THE COURT: All right. Thank you both.

I trust that neither of you are aware -- are aware of any litigation regarding this Unlawful Dissemination of an Intimate Image charge here in Oregon that we've not --

MS. ATWOOD: I -- so I've --

THE COURT: -- that we haven't dealt with yet.

MS. ATWOOD: -- contacted Department of Justice ot see if anything's been on their radar, if anyone is having any similar motions or if there's anything on appeal and they told me no.

THE COURT: Okay.

MS. ATWOOD: This is it.

THE COURT: All right. I assume you've found the same thing --

MR. TAYLOR: I did.

THE COURT: -- to be true? All right. All right. Thank you both. I am not going to give you an answer right away. I'm going to do some additional homework. But we need to deal with the trial setting, apparently?

MS. ATWOOD: Yes.

THE COURT: Does it make sense to set a trial or whatever our next dates are appropriate and then let me get you a decision, which will decide whether or not those dates will still hold?

MR. TAYLOR: Makes sense to us.

THE COURT: Do we just need a trial date or do we need any other dates?

MS. ATWOOD: I think just --

MR. TAYLOR: Judge, this --

MS. ATWOOD: -- just the trial date.

MR. TAYLOR: -- this is a misdemeanor. We've already had FRC.

THE COURT: Okay. Very good. And what's -- I've tried to find on the computer an order regarding that decision and the reason for it, but I -- I could find your motion, but I couldn't find an affidavit and I --

MS. ATWOOD: Right.

THE COURT: -- couldn't find a signed order. But -- but Bailey granted a motion to --

MS. ATWOOD: So it was kind of a retroactive motion. We note -- well, like, so after defense counsel filed this demurrer, we also got a substantial amount of discovery. Most of that information's laid out in the motion itself.

But we went to FRC. And at that point, I had not filed the reset yet because I wanted to float the idea to Judge Roberts of severing the demurrer from the trial, since I thought, you know, that whoever got the demurrer would want a substantial amount of time to, you know, do some research and consider it.

And that was what she granted there at

FRC. And -- and her order -- just her, you know, GPO from that setting, she crossed off the trial and just put motion today at 8:45 and told me, "Now, go file a reset to sort of formalize it."

THE COURT: Okay.

MS. ATWOOD: So I think that that was the granting, but I don't think it really went before presiding.

THE COURT: Okay.

MR. TAYLOR: That -- if I may just add to that? That was the day that Judge Erwin was presiding --

MS. ATWOOD: Yes.

MR. TAYLOR: -- because Judge (indiscernible) was on vacation. I know Judge Roberts called Judge Erwin and he sort of stamped --

MS. ATWOOD: He kind of gave --

MR. TAYLOR: -- off --

MS. ATWOOD: -- the marching orders.

MR. TAYLOR: -- on this plan.

THE COURT: All right. Very good.

So we will set a trial date. When do you want to do this --

MS. ATWOOD: Well --

THE COURT: -- roughly speaking?

MS. ATWOOD: -- that's a good question. I need to confer, not only with victim's counsel, but with my witnesses to make sure that we don't have any bad dates coming up. I know I, personally, have some bad dates coming up, so if I could have a couple of minutes to do that?

It may be easier just to set the date once the demurrer is decided 'cause that, obviously, would effect whether we have a trial or not.

MR. TAYLOR: Well, we certainly need to --

THE COURT: Well --

MR. TAYLOR: -- pick some kind of a next date.

THE COURT: Yeah. We need to -- we need --

MS. ATWOOD: Okay.

THE COURT: -- something out there. Why don't we do this? Why don't we --

MS. ATWOOD: I can -- I mean, I can find this information out, like, right now if you want me to.

THE COURT: Yeah. Let's -- let's give everybody a break and then come back at -- have an

appearance at 11 o'clock with the defendant and everybody here and we'll put a new trial date on the record. Hopefully, you -- you all will have done what you need to do to pick on and agree on a date by 11:00.

MS. ATWOOD: Yeah.

MR. TAYLOR: And, Judge, there was the obvious also contemplation that Mr. Barber would be released today. Today is the 62nd day. He's not willing to waive. Can we take that up when we come back at 11:00?

THE COURT: I assume you're --

MS. ATWOOD: Yes.

THE COURT: -- in agreement that --

MS. ATWOOD: The only real issue --

THE COURT: -- he ought to be released?

MS. ATWOOD: Right. The only real issue there would be determining the conditions of release. We have already had one release hearing in this case, where Judge Upton, in her order on that hearing, stated that if -- even if he were to post the bail that she had raised, that a certain number of conditions would apply. So I think -- I'm assuming everybody would want to be heard on those.

THE COURT: Okay. Very good.

Well, let's do that at 11:00. He will be released at some point today. And we'll discuss a trial date and release conditions at 11 o'clock.

MR. TAYLOR: Thank you, Judge.

THE COURT: Thank you.

(Recess taken, 10:32 a.m. - 11:03 a.m.)

(Whispered discussion, off the record, 11:03 a.m. - 11:06 a.m.)

THE COURT: So do we have dates picked?

MS. ATWOOD: Yes, Judge.

THE COURT: Excellent. What is our new trial date going to be?

MS. ATWOOD: Well, the first thing we were going to float by you is whether or not you'd like to retain the case. And if so, if this date works for you --

THE COURT: Okay.

MS. ATWOOD: -- we have chosen --

THE COURT: I'm going to --

MS. ATWOOD: Yeah.

THE COURT: I'm going to -- I'll ask my presiding judge whether he will -- wants me to keep it or not, given the ruling that I have to make if we get to a trial. But I'm going to let him decide that.

But what's the date?

MS. ATWOOD: November 9th.

THE COURT: November 9th. I'll -- I'll be here.

MS. ATWOOD: Okay.

THE COURT: So if it's assigned to me, great. If it's assigned to someone else, that is fine, too. And I will try to get you a ruling as soon as possible -- it's going to be a couple days, I imagine, on --

MS. ATWOOD: Sure.

THE COURT: -- the demurrer. So November 9th, 8:45 a.m. for Mr. Barber's trial. And Mr. Barber is going to be released today. He'll need to sign a release agreement. And I'm wondering if the release conditions are somewhere here electronically to look at. I think they are.

Looks like Judge Upton intended for him to reside with a responsible person, obey house rules, et cetera, not to leave residence, not to possess or consume alcohol or illegal drugs, no contact with the victim, may not own or operate computer, handheld device with internet access, no social media.

And I assume the -- is the State

requesting that those conditions continue?

MS. ATWOOD: Yes, Judge.

THE COURT: Okay. Thank you.

Mr. Taylor.

MR. TAYLOR: Judge, a couple things. First off, there is not -- there is no responsible third party. The only person my client has in the State of Oregon is his mother, who lives in a different county and is going into very substantial surgery in two days.

So the idea of him being placed with a third party is, for all intents and purposes, impractical and impossible. And I -- I think requiring a third party would effectually keep him in custody, which I don't think is -- is proper at this point, given that his 60 days have run.

What I can tell the Court is that I have been to Mr. Barber's house. He resides -- he rents a room about two blocks from here, right over on the other side of Lincoln. That's where he lives, Judge. You know, he -- he lives in Hillsboro. He works in Hillsboro at Intel.

So I don't think a third party is necessary in this case. You'll note that my client has practically zero criminal history. He currently

has a Criminal Trespass II community court case in Multnomah County. That is it.

You know, the only other thing that pops up is a arrest for Harassment in 2013, which did involve this case. Both the -- Mr. Barber and the alleged victim, in -- during the course of their marriage, had arrests in summer of 2013 for Harassment. Neither of them were convicted and no charges were filed.

So I don't think this is a case where a third party is appropriate under the law. And I don't particularly think it's necessary. The other thing you'll note, Judge, is there was an FTA in this case and if I can sort of explain what happened there.

When my client was initially arrested, he was taken into custody --

THE COURT: I'm not interested in an FTA. Thank you.

MR. TAYLOR: All right. So I guess, Judge, the other thing I'd like to be heard on is the conditions and, particularly, the ones regarding internet and things like that. Now, obviously, my client has no opposition to a no contact with the alleged victim in this case.

It's my understanding that they have not even seen each other in person in over a year. And a year ago, they were on relatively amicable terms. The only contact they have had since then has apparently been texts and e-mails and things like that.

My client, obviously, understands that he would not be allowed to do anything like that or even related to that on release. But with the issue of -- of internet and computers, Judge, my client is a systems administrator. He is a software person. That is the only line of work he has had.

That's what he does professionally. So I had explained to him that I was going to ask the Court -- we understand where the Court would be coming from with those concerns. But I think what we would ask is use of internet and things like that only at work for work purposes.

What I can tell the Court is, like I said, his most recent employment was at Intel. Those are the types of places he works. So you're obviously not going to be allowed, at those places, to, you know, get into pornography or social media or things like that.

He understands exactly what the lay of

the land is as far as what is categorically inappropriate. I am not concerned about him violating his release.

What I think he's going to want to do is go to work given he's been in custody for 62 days, and he's going to want to talk to me about his case. So those are the conditions we would propose.

THE COURT: All right. Thank you.

Ms. Atwood, did you want to be heard further?

MS. ATWOOD: Other than reiterating that we would request all the previously ordered conditions, there was one other no contact we were going to ask for. The victim in the case now has another -- she's in another relationship with an individual named Micah Goldstein (phonetic).

It's my understanding that he's also, through the course of this series of events, had some negative interactions with the defendant. And she frequently is with him or resides with him or they are together. We would also ask that he be subject to a no-contact order as well.

MR. TAYLOR: He would, obviously, have no problem with that.

THE COURT: Okay. Thank you.

All right. So, Mr. Barber --

Well, did you want to be heard?

MS. KEBLER: Just -- just briefly, Judge. I think -- I -- I just wanted to speak to the third party. I think one of the biggest concerns with Mr. Barber being out of custody is his -- is continued use of the internet, continued potential postings about my client, about this case.

And so that's, I think, part of the reason Judge Upton was looking for a third party to be monitoring him when he's not at work. And I understand that that was kind of a -- at issue before, but I think that's the main motivation for that type of supervision.

And I just don't know any other way to guarantee that -- even -- even then, it's not a guarantee that he's not, you know, using the internet at home for reasons he shouldn't be. But that's the main concern.

She doesn't want any continued kind of contact or any continued updating or posting of anything while he's out of custody.

THE COURT: All right. Thank you.

And, of course, he could -- even if he was with a responsible person, unless they were awake

24/7 and looking over his shoulder, he could do things with computers or portable devices.

I'm -- I'm not going to require the third party, but I'll try to fashion conditions to assure that the victim isn't subject to any type of contact or harassment from Mr. Barber.

So the release agreement will need to include the following conditions: I'm going to keep in place the do not possess or consume alcohol or -- or illegal drugs condition that Judge Upton originally imposed. He's to have no contact with the victim, the family of the victim or any witnesses.

He's also to have no contact with Micah Goldstein. He is prohibited form possessing or operating any type of computer. And that includes any handheld electronic devices, telephones, anything that has internet access unless it is for purposes solely related to employment.

He is to not visit any social media websites. He is prohibited from disseminating, in any manner, internet or otherwise, any photographs or images of the victim in this case.

And I'm sorry, victim's attorney, Kebler --

MS. KEBLER: Yes.

THE COURT: -- is that the name? Ms. Kebler, does that address your concerns?

MS. KEBLER: I think that that goes mostly to it. And I know that what -- I was at the hearing where Judge Upton made those findings and all of what she said sounded appropriate to me, so --

THE COURT: Okay.

MS. KEBLER: And maybe -- maybe just move that he's -- he needs to reside at -- at whatever the address that he's at and not move without Court permission so that we -- everyone knows where he's at.

THE COURT: Okay. That seems reasonable as well. Does he still have that residence available to him --

MR. TAYLOR: So, Judge, I -- when I was over there --

THE COURT: -- Mr. Taylor?

MR. TAYLOR: -- about a month ago, the landlord told me he was paid 'til the 30th of September, which is two days from now.

I -- quite frankly, Mr. Barber does not have any money in his accounts. He expects to be able to pick up his last couple paychecks from work, pay his rent and stay there.

THE COURT: Okay.

MR. TAYLOR: But I don't think we can guarantee that at this point.

THE COURT: Okay. What is that address?

DEFENDANT BARBER: 176, what is it, Lincoln Street -- Lincoln Avenue?

MR. TAYLOR: No, it's -- it's on --

MS. ATWOOD: Jackson, isn't it? We had a conversation about this before.

MR. TAYLOR: Right. And, Judge, the reason for the confusion's that Mr. Barber just moved in there about a month before, so it's not like he's been there forever and remembers his address.

THE COURT: Okay.

MR. TAYLOR: I have it written down somewhere in my notes. I will look for it. One second.

MS. KEBLER: Is it 176 Southwest Jackson Street?

MR. TAYLOR: I believe that is accurate?

MS. KEBLER: Does that sound right?

MR. TAYLOR: Yes.

MS. KEBLER: It's on his release.

MS. ATWOOD: Yeah.

MR. TAYLOR: If -- if it's any

different, it's because it's Southeast instead of Southwest.

MS. KEBLER: Oh, right.

MS. ATWOOD: Right.

MR. TAYLOR: That was the confusion. And, Judge, I had one more question.

THE COURT: Okay. Thank you.

MR. TAYLOR: Can Mr. Barber use technology to communicate with me, as in, you know, calling my office to schedule an appointment or sending me an e-mail?

THE COURT: He can use a telephone. That's technology.

MR. TAYLOR: Uh-huh.

THE COURT: But he's not -- he's not allowed to possess any type of computer or handheld device that includes internet access. So I suppose if he had a flip phone, you know, that would work as well. He's close enough he can walk, so --

MR. TAYLOR: Thank you, Judge.

THE COURT: All right. I'm ordering that he must reside at 176 Southwest Jackson, comma, Hillsboro. And, of course, if he's unable to reside at that address, he'll be required to notify the Release Office of change of address.

That's standard on a release agreement, is it not, that he's got to keep the Release Office apprised of any change in address?

All right. I'll try to get you a written decision as soon as possible. I suspect it will be -- what day is this, Wednesday? It will be next week sometime.

MR. TAYLOR: Thank you.

MS. ATWOOD: Thank you.

MS. KEBLER: Thank you, Judge.

MR. TAYLOR: And, Judge, as I asked and said we'd put on the record, if the Court would give us permission to e-mail citations to any cases we argued but were, perhaps, not in our briefs?

THE COURT: Yeah.

MS. ATWOOD: Oh, okay.

THE COURT: So if there -- if there are any cites that you referred to in oral argument today that were not in your written filings, you can e-mail those to me. Make sure you CC the other party, please, but also if you'd limit it to cases that you specifically referenced during --

MS. ATWOOD: Sure.

THE COURT: -- your argument this morning.

MR. TAYLOR: Thank you, Judge.

THE COURT: Thank you.

* * *

(Court adjourned, Volume 2, 9-28-16 at 11:18 a.m.)

REPORTER'S CERTIFICATE

I, Katie Bradford, Court Reporter of the Circuit Court of the State of Oregon, Twentieth Judicial District, certify that I transcribed in stenotype from a digital audio recording the oral proceedings had upon the hearing of the above-entitled cause before the HONORABLE ERIC BUTTERFIELD, on ***September 28, 2016***;

That I have subsequently caused my stenotype notes, so taken, to be reduced to computer-aided transcription under my direction; and that the foregoing transcript, ***Volume 2 of 5, Pages 21 through 111***, both inclusive, constitutes a full, true and accurate record of said proceedings taken from a digital audio recording and so reported by me in stenotype as aforesaid.

Witness my hand and CSR Seal at Portland, Oregon, this 11th day of January, 2017.

Katie Bradford, CSR 90-0148
Court Reporter
CSR Expires: 9-30-17
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